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1942 SABOTEURS CASE

VOL. XVIII OF XVIII

TRANSCRIPT

XVIII

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STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS  
Before the  
MILITARY COMMISSION TO TRY PERSONS CHARGED WITH  
OFFENSES AGAINST THE LAW OF WAR AND THE  
ARTICLES OF WAR.

Washington, D. C.

Saturday, August 1, 1942.

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VOL XVIII

## C O N T E N T S .

Saturday, August 1, 1942.

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## STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS

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Washington, D. C.

Saturday, August 1, 1942

The Military Commission appointed by the President by order dated July 2, 1942, met, in room 5235 Department of Justice, at 9:30 o'clock a. m., to try for offenses against the Law of War and Articles of War, the following persons: Ernest Peter Burger, George John Dasch, Herbert Haupt, Heinrich Harm Heinck, Edward John Kerling, Hermann Neubauer, Richard Quirin and Werner Thiel.

PRESENT: Members of the Military Commission, as follows:

Major General Frank R. McCoy, President,  
Major General Walter S. Grant,  
Major General Blanton Winship,  
Major General Lorenzo D. Gasser,  
Brigadier General Guy V. Henry,  
Brigadier General John T. Lewis,  
Brigadier General John T. Kennedy.

As Trial Judge Advocates:

Major General Myron Cramer, The Judge Advocate  
General, U. S. Army.

Colonel F. Granville Munson,  
Colonel John M. Weir,  
Colonel Erwin M. Treusch,  
Officers of the Judge Advocate General's  
Department.

As Provost Marshal:

Brigadier General Albert L. Cox.

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As Counsel for the Accused except George John Dasch:

Colonel Cassius M. Dowell,  
Colonel Kenneth Royall,

As Counsel for the Accused George John Dasch:

Colonel Carl L. Ristine.

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# PROCEEDINGS

The President. The session is open.

Colonel Munson. If the Commission please, the eight defendants are present and the reporter is present. The staff of the prosecution is present except that Mr. Rowe is still absent; Mr. Cox is temporarily absent, and the Attorney General is absent, but requests that the Commission proceed until his return a few moments hence.

Major Thurman of the prosecution is also temporarily absent.

As to the defense staff, Major Stone, Captain Hummell and Captain Bruton are absent.

The President. The defense may proceed.

Colonel Ristine. May I ask the indulgence of the Commission for about five minutes longer to bring up one matter which I should have touched on yesterday?

The President. We will be very glad to have you do so, Colonel.

## ARGUMENT ON BEHALF OF THE DEFENDANT DASCH by COLONEL CARL L. RISTINE--Resumed

Colonel Ristine. In my concluding remarks yesterday, if the Commission please, I said something respecting the failure of the F.B.I. to say anything from the witness stand

3w     respecting a recommendation on their part so far as Dasch was concerned. I now recall that there is in the record that which might be termed as a recommendation, so far as the F.B.I. is concerned, and I think, in fairness to them, that I should mention it.

On page 541 of the record I asked this question in cross-examination of one of the F.B.I. agents; I think it was Mr. Wills (reading):

"Q     And was it stated as a part of that proposal"--

This has reference to a proposal that was made to Dasch about some proceeding in the Federal court--

"Q     Was it stated as a part of that proposal that after his plea of guilty he should be sentenced and that during the trial he should not divulge anything with respect to the agreement that was made, and that after the case had died down and for about, say, three to six months, the F.B.I. would get a Presidential pardon for him?

"A     That, in substance, is true."

And on the next page, 542:

"Q     Would you tell the Commission what was said in favor of the proposal, if anything, respecting his father and mother?

"A     The proposal was given to protect the father and mother and relatives in Germany or in German-occupied countries."

Then the Attorney General interjected:

"To protect them from what?"

And the witness said:

"From harm."



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And then this question, skipping a few, was asked:

"Q Could you tell us what statements were made to Dasch by you and Mr. Johnstone in asking him to agree to that proposal?

"A The exact wording I do not recall; but he was told that he should have some consideration for his father and mother and relatives over in Germany and occupied countries."

The Attorney General cross-examined him with respect to that. My questions in cross-examination were a little bit leading, but the Attorney General examined him, and we find that examination on page 545, and there is this question by the Attorney General:

"Q And what did you say to him with reference to if he would plead, what would happen, what was told him exactly?

"A As I recall the substance, he was told that if he appeared in Federal court and entered his plea of guilty and be sentenced along with the other defendants, that after a period of about six months efforts would be made to get a Presidential warrant, or that he would get a Presidential warrant--a Presidential pardon."

I am skipping a few questions. Then this question was asked by the Attorney General:

"Q Did anybody promise him anything?

"A Yes, sir. Mr. Donegan, on the afternoon of Saturday, June the 27th, told Defendant Dasch that he would be indicted and appear before a Federal court, that at that time he should enter his plea of guilty, or if

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he entered his plea of guilty and he was sentenced to prison along with the others that through the F.B.I. a Presidential pardon would be obtained for him."

That is the witness Wills.

Now, let us see how Dasch understood it. Colonel Royall cross-examined Dasch respecting that matter, and it appears on pages 2571 and 2572 of the record. I will read from about the middle of page 2571:

"Q George, when was this agreement made that you would plead guilty and that after some period--six months, I believe it was--you would get a Presidential pardon? When was that agreement made with you?

"A On Saturday night, June 28, I think was the date--June 27.

"Q At that time you had already given them most of the facts about the case, had you?

"A Yes, sir, I had been with the F.B.I. from 11 o'clock or 10:30 in the morning from Saturday--that was the 18th, then--no; we are speaking of July, not June --from Friday the 19th up until Saturday the 27th.

"Q The 27th?

"A That is right.

"Q At the time they made that promise to you, therefore, they had had eight days in which to talk with you and discuss the matter?

"A Yes, indeed, sir.

"Q What exactly did they promise you?

"A They took me downstairs into the room--

"Q I did not ask you where they took you; I just asked you what they promised you.



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"A They said to me, 'George, the best way for you-- for your case is to go and plead guilty.'

"So, I have told them, 'To plead guilty for what?'

"Well, you plead guilty, and you have to go in front of court, and now is your time to act. This is the biggest act in the world. You have to stay there and take the punishment and don't say nothing. Don't say, 'I have been to the F.B.I.'; just take it; that is all.'

"Then you go to prison, and after six months or three months'-- Mr. Traynor said it might be only three months; the others say it might be only six months-- then I would receive a Presidential pardon; and to the fact--they then played up the fact of my mother and the security of my parents, and I said, 'Yes, sure; for the security of my parents, I am willing to do that,' so I agreed to that."

You will recall that Mr. Donegan took the stand and, in explanation of it Mr. Donegan said that there was a promise to use their influence to obtain a Presidential pardon, and he also said that six months was discussed and mentioned as the probable time when it would be accomplished, although Mr. Donegan said there was no absolute promise of a Presidential pardon.

I call your attention to that because I do not want to be unfair to anybody. I said that the F.B.I. should have made some recommendation. That is in the record, and I think that is a very candid statement of their estimate of the guilt or innocence of Dasch.

(At this point the Attorney General entered the court room.)

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In other words, as I understand it, the only reason for his entering a plea at all was to protect his relatives in Germany, and not for the purpose of punishing him for anything which he had done.

I just submit that in explanation and, possibly, apology for my statement about the F.B.I., and for your consideration.

The President. You may proceed, Colonel Royall.

ARGUMENT IN BEHALF OF THE DEFENSE  
by  
COLONEL KENNETH C. ROYALL

Colonel Royall. If the Commission please, I desire this morning to talk about the defendant Haupt and finally the defendant Burger, and then call your attention at the conclusion to some general principles; and my argument will be brief.

The President. I would like to inform defense counsel that they have all the time in the world in which to present their case.

Colonel Royall. That is very considerate of the Commission, and we had assumed that that would be the attitude of the Commission. However, I do not think it is going to take very much time to cover the points that I think should be covered.

In connection with the matter which Colonel Ristine brought up, since it is fresh in the minds of the Commission, it suggests to me two things that may be material in this case so far as one or more of the other defendants are concerned.

This Commission, of course, has the responsibility of determining the guilt or innocence of these men and what punishment should be imposed upon each of them separately in case they are found guilty.

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The suggestion of the F.B.I. as to the plea of guilty was not made to this Commission; it was made in connection with a civil court. Without meaning to be critical, because everybody realizes that the F.B.I. had an objective, that it wanted to find out as much as it could about this whole situation, not only about these defendants but about everybody else, I do not think that sort of a suggestion to a prisoner is quite the thing to do, in any event; and certainly the attitude of letting a court act on something in the hope that somebody above them will take certain action is not consistent with either the dignity of the court or the dignity of this Commission. But I have no fear that this Commission will take the attitude that whatever is done is subject to review and it does not make any difference. You have given such careful attention to this matter; you have studied it obviously with such diligence that I know that that is not going to be the attitude of the Commission.

I think, however, it is very material that the F.B.I. was of the opinion that Dasch ought not to have any material punishment. They had studied the case very carefully. It was brought out on cross-examination that they had studied it for eight days. They had the statements of practically all of these defendants at that time, and they knew the thing from top to bottom, and they certainly were diligent on behalf of the Government and they felt that Dasch ought not to be punished in any material degree at that time, to such extent that that promise was made, according to Mr. Wills.

That is material principally to the defendant Burger, because the evidence discloses beyond question that they were,

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at the time that Dasch talked to the F.B.I., acting together, and therefore what was said about Dasch would necessarily include Burger. If the F.B.I., as a law-enforcement agency, thought that Dasch ought not to be punished more than six months, then it certainly should have thought that Burger should not be punished even that much, we say.

There is one other thing about it to which I wish to refer.

There have been some little inconsistencies between the statements of various of the defendants. We cannot run away from that fact. There are some differences between their statements, and in some instances differences between their statements and what they said on the stand. There have been some little conflicts, usually in minor matters, between the defendants themselves. But that is not confined to the defendants.

I have a list, which I would be glad to give to the Commission, of thirty-seven inconsistent statements made by members of the F.B.I. in this trial.

Of course I do not want to get into a trial of the F.B.I. We are not trying to do that; and this is not said with the idea of criticism. But human beings are such that in telling a story, seven or eight men, which is about the number of F.B.I. men who testified, there are always some little inconsistencies, differences in recollection and differences in understanding. I think one of the most typical is the one that has been mentioned. The Attorney General asked the witness Wills:

"You mean, there was a definite promise?"

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He said, "Yes, a definite promise."

There is an F.B.I. man saying that. That was not in response to Colonel Aistine's question; it was in response to the Attorney General's question.

Then Donegan goes on the stand and says that there was no promise.

That does not mean that either one of these men is untruthful or subject to censure. It just means that they understood it differently. But if that can occur with an agency as careful as the F.B.I. certainly is, it can occur with men of this type.

So I do not think that too great weight should be given to the fact that maybe between some of these defendants there are some inconsistencies or difference in understanding of just what was said and done.

I do not want to burden you with illustrations, but in the case of the defendant Thiel or Kerling--I forget which one--one of the agents said that after Kerling made a statement about being struck, Donegan took him off by himself in a room, and when he came back he retracted it, and Donegan said he never was alone with Kerling.

But that does not mean that Traynor was deliberately telling a story; it just means that they remembered it a little differently; and I have got 37 inconsistent statements written down. By that I do not mean that we are trying the F.B.I.; that is not my purpose. It is only to illustrate that even honest and competent men, as the F.B.I. men clearly are, can have differences in recollection even when they keep a minute record of it themselves.



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Before I come to Haupt and Burger: I asked the other defendants if there were any matters that I did not mention to the Commission that they thought should be mentioned. The only things that have been suggested to me are these, that in the case of the defendant Neubauer he wants attention called to the fact that his wife is an American citizen, the fact that she never became a German citizen. That is an indication that they always had the idea of living in America.

Another thing is that there has been some difference in recollection of the details in the category that I discussed a moment ago as to whether these men actually became members of the German army or not. Of course they were dealt with separately. Some of them admit that they did; some of them said they never were. That may have been a difference in understanding, just like it was between Mr. Wills and Mr. Donegan. However, regardless of that, one thing is certain: they were all acting under orders in some capacity. They were more or less forced to do it as either members of the army or in some other capacity where they had supervision over them.

Now, coming to these two defendants, the testimony of the defendant Haupt would, in my opinion, be convincing beyond question to any court or commission, but for two circumstances.

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One was when the other defendants followed him on the stand and all contended that they also wanted to come to America. That naturally threw some doubt upon the story of Haupt himself. He was really the first one to make that statement on the stand. That is human nature. It lends itself to the argument that maybe they were just making up something. There are varying degrees of corroboration about that. Some of them have nothing to corroborate what they said; others have circumstances to corroborate it.

It is our view that this being a judicial body, it is absolutely essential that each case be tried upon the facts of that case; and where there is a difference in fact, that that be given effect in the matter of both conviction and punishment.

I have prepared--it is very rough, because it was just simply done for the purpose of my own argument--I have prepared and will present to the Commission for use or nonuse, as the Commission may elect, an outline of what we think are the salient facts as to each defendant with reference to page numbers of the record, so that if you want to refer to it in considering any defendant, it may make it more convenient. If you do not want to use it for any purpose, we, of course, will understand that. The Commission will elect whether or not it will use it.

The President. Do I understand that this is to be offered in evidence?

Colonel Royall. No, sir. It will be offered more or less as a summary of the argument; and if the gentlemen of the prosecution think it is inappropriate, then the Commission can decide that. That is the reason why I bring it up at this

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time. It has references to page numbers. It is just a copy of what I am using as notes in my argument, with the page numbers on it.

I made these copies for this reason: The Commission once or twice during the hearing suggested that perhaps some memorandum pointing out page numbers or citations--for example, in the case of the statutes--would be helpful. It is frequently appropriate that some form of brief be handed up in connection with oral argument. We do not want to prepare any brief, but this is merely a reference to the pages with the data connected. Of course, the other side will be furnished with a copy, too. But when the time comes, if the Commission does not think it ought to consider this, we will understand that.

I know that it is appropriate. I know that in any court you can always hand to the court a summary of either the factual or the legal situation for reference to the evidence. I do not know of any reason why it should not be appropriate here. But I shall not argue that question to the Commission; I leave it to them to decide.

The Judge Advocate General. May it please the Commission--

The President. The Judge Advocate General may comment.

The Judge Advocate General. It seems to me that it is very inappropriate. All the evidence has been submitted, the facts have been presented to the Commission, and the Commission has access to the record. References are made there. This is simply putting another argument into the Commission's hands after the Commission has recessed to make its findings.

Colonel Royall. I merely say in answer to that that the

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same thing is true of any brief in any court. Of course it is not evidence; it is merely a reference to evidence. It is not worth anything unless it is correct and correctly refers to the evidence.

What I am going to do, may it please the Commission, is not offer it in evidence, not insist on it in any degree, but merely tender it. If the Commission desires to use it, all right; if the Commission desires to ignore it, all right.

The President. We shall be very glad to have you tender it.

Colonel Royall. Yes, sir.

A Member. I think you might use it as part of your argument. You might read it or do anything else with it you please. You want to use it in that way and offer it; is that right?

Colonel Royall. Yes, sir, as part of my argument. But I do not want to get into any argument with the Commission about that. If the Commission does not want to consider it, certainly that is satisfactory to us.

The President. You may tender it as part of your argument, and the Commission will give an opinion on it.

Colonel Royall. May it please the Commission, I was talking about the defendant Haupt. The distinguishing feature between the defendant Haupt and some of the other defendants on the question of whether this story of wanting to return to America is correct arises from the fact that he made that statement in his written confession to the F. B. I., and he made it in exactly, with practically no variation, the same substance as he testified on the stand. He made that statement

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when he was not with any of the other defendants. He had not seen any of the other defendants. He did not know what they were going to say; and if he had, it would not have helped them, because none of them said anything similar to what he said as to their case, although all of them corroborated his story to a considerable extent. Therefore, that should be given consideration.

The President. In what particular? Would you refer to it again explicitly?

Colonel Royall. The Haupt confession states that he left here because of some difficulty with a girl; that he left to go to Mexico; that he went there thinking he might get work and could go to Central America; that he ran out of funds; that he had already applied for a passport to Central America. Continuing his story, which I shall go into in a little more detail, he went to Germany, landing there the day war was declared. You see, we were not at war with Germany when he went. He landed there the day war was declared and was immediately viewed with suspicion. He was a young boy, and all his ties were here. He tried to get back to America, and this was the only way in which he could do so. That is what he said in his statement to the F. B. I. when they apprehended him, before he had seen anybody with whom to discuss it. That is what he said on the stand.

He was subjected to the most thorough cross-examination of anyone who has been offered as a witness, except possibly the witness Dasch and the witness Burger. In that cross-examination, as I recall it, the prosecution did not develop a single inconsistent statement, either inconsistent with his direct

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examination or inconsistent with his statement given to the F. B. I. upon apprehension. There may have been some difference in wording, but the only thing that they tied to at all was the fact that he said that when he registered in Florida he did not put down any street address. I do not know: I know that I sometimes register without giving the street address. I live in a country town. I sometimes put down "Raleigh" and sometimes put down a street address in Raleigh. Nobody remembers that all the time.

It turned out that Haupt did put a street address where he had lived, the last place he had lived in Chicago for any considerable length of time. He had been out of Chicago, and it would have been misleading to give some town outside Chicago, and he had not lived in Chicago but a month, and he did not put down that address. He put down an address in the same general neighborhood where he was known, where he had lived. So, his neglect to put down a street address could not have been for the purpose of concealment. That is the nearest approach to a contradiction that they found in his evidence. He said the reason he did not put a street address down was that he had forgotten the exact street number of the place he had lived for just a month before he went away from there. That, of course, is thoroughly understandable. If he had done so for the purpose of concealment, he certainly would not have given a place where everybody knew him.

He said he left here because of some difficulty with a girl. We are not trying him for that. He has probably proved himself guilty of some unlawful or immoral conduct in connection with Miss Stuckmann. She did not say that he promised to



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marry her, but he got in trouble and skipped out. That is a bad thing to do, but it happens every day. The girl, of course, deserves sympathy. She was a widow, and it was unfortunate. But that has happened many times before. It is not a terrible crime. If he had seduced her under promise of marriage, it might have been more reprehensible.

She became pregnant, and he did what many other 21-year-old boys would have done: he left and went down to Mexico. He told a number of people he was going. You will remember their being on the stand. Mr. Eagen and others testified. He did not make any secret about where he was going. He applied for a passport to Nicaragua but was told that none were being issued at that time and returned his money to him.

He was a skilled worker. He told the Government ordnance men where he was going, and he went there. He went down and tried to get work. The ordnance report is one of the strongest things in his behalf. There is a report we did not know about and never saw before. We did not know what was in it. He did not know. He could not have known it until it came into court. Yet it corroborates him in every particular. It was written by an officer last year. Haupt never had any knowledge of what the officer had written.

It says not that he was an irresponsible boy but that he had got the wanderlust. That ordnance report appears on page 1967, and I do not know of a better corroboration that he could have obtained.

There was no reason for him to go to Germany. He had no folks there. He had not been there since he was five years

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old. None of his immediate family were there. He wrote to his folks along the way from St. Louis and Mexico. When he got to Mexico, he ran out of money, and somebody said, "We will send you to Japan." That was farther from his troubles and in line with his adventurous spirit, so he went there. When he got there, they put him in what he said was really a labor camp. He said he did not want to go home quite yet. It was not time yet; his trouble had not blown over sufficiently. So, he went there but with no idea of going any farther. He had thought of going to the American Consul but was told that they were not providing funds for anybody to go out of the country. That was a German whom he ran into, this man in the cafe.

Haupt was a 21-year-old boy. You cannot judge him by the criterion of a mature man. He took that money and went. He cabled his parents from Japan. Then he got out. He said he was a vagrant out there and was treated as such. I don't know whether he was quite as hostile about living around where the lewd women were or not, but he said they put him in the section where the lewd women lived. But he said he did not want to be treated as a vagrant, and he got on a ship, got a job as a seaman, and finally learned he was going to Germany, and he got there. He got there at a very unfortunate time. He was an American citizen. His parents lived in America. He landed in France on the day of Pearl Harbor. It does not require much imagination to know what a reception he received from the Germans. I suppose we all remember the newspaper articles as to how Germans who happened to reach America that day were viewed with every type of suspicion. I reckon that Germany was in somewhat the same fever--perhaps not as much as

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we were, but they were disturbed about the thing.

Haupt says he was checked and rechecked and held down. He was in doubt whether he was a citizen. He tried to make out that he was a German in order to escape mistreatment, but he could not get a job anywhere, for the Germans would not let him work anywhere.

He went to his grandparents. The authorities went there every day or two and checked up on him. That was exactly what would have happened to a German who came here and landed on the very day of Pearl Harbor. They checked up on him. Finally they asked him to come down and write an article, and he did that, and then they told him about this plan. They told him, "You have an uncle over here who because of his American connections has been put in a concentration camp. You have another uncle who has been in concentration camp. Do you want to go ahead with this job, or don't you?"

Well, he had two motives. He did not want to go to concentration camp, and he wanted to get back to America. That was where his mother and father were, and most 21-year-old boys want to be with their parents if they have no family of their own. He did not know a boy his age in Germany except the boy who came with him. He did not know anybody else his age. He did not have any close family connections of any kind. So, he took this up with no intention of carrying out the plan.

They say, "Well, did you tell anybody?"

How much chance would he have had to get back to America if he had told anybody that was his purpose? He would not have had any at all, and he did not tell anybody.

When he came over here, although they had provided him

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with a registration card in the name of Larry Jordan--although that had been done--and a social security card in the name of Larry Jordan, he destroyed them. He went to a hotel and registered in his own name. He gave an address in Chicago. Right in Jacksonville, he gave an address where everybody knew him. He gave his own name in buying a watch in Jacksonville, and if that was not true, they could have checked it up. They checked the hotel record. You know, they checked everything.

He said in his statement that he went on home and registered for the draft and then went down and applied for a job. Instead of using the money for the purposes for which it had been given to him, he gave some of it to several of his friends, and he tried, we say, to get back into the run of American life. They say that maybe that was just a plan to cover up. Well, if it was, why did they give him a registration card in the name of Larry Jordan? Why did they give him a social security card in the name of Larry Jordan? Why did they do that if that was to be the plan for him to cover up?

I must admit that naturally he did not want to get caught until he could do something about this thing or get a chance to get here. He knew the dangers of the thing. He said the reason why he did not do anything or tell everybody about it was that they told him they were going to meet in Chicago on July 6--and they all said that in independent statements before that--they were going to get together and discuss it, and he thought he would wait there until these other boys came. He did not want to be a rat, he said, and tell them that he was not going ahead with it. He had been afraid to tell them earlier. He did tell Neubauer, so Neubauer says, when Neubauer got there;

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but he had not seen the others, and he said he was going to tell them that.

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Well, now, that is the story. It is not necessary for us to convince you, even by the weight of evidence, whether that story is correct or not. I think, taking all the circumstances, it is so far corroborated that you would be convinced. But can there be any doubt in anybody's mind that that is substantially corroborated? Can any commission find beyond a reasonable doubt that that boy is not telling the truth, with all those circumstances?

We can all remember, to some extent, when we were 21 years old. Some of us have children or friends of ours have children about the same age. Let us apply his story and test--we cannot apply it to anybody else--to that of a 21-year-old boy, raised in America, all his friends in America, his parents in America, and getting in trouble with a girl and running away, and getting to Europe the day Pearl Harbor occurred. That is the situation with him. It is a situation which differs radically from those situations of the other parties that I have discussed.

If the Commission should desire or care to use this memorandum for any purpose, it may do so. We have the page numbers of that testimony. I have not sought to read that to you, because you have the record. In none of the instances up to this time have I read the testimony. I am going to read a little of it in Burger's case, because that presents a different situation.

That is the situation about Haupt. I think he is entitled to special consideration because of those facts.

The President. The Commission wishes, if you care to have this considered for our convenience, that you first show

it to the other side to see whether they care to make objection or to make any remarks on the subject.

Colonel Royall. I have tried to follow this. Of course, someone speaking from notes does not look to follow; but, at the same time, I have used it.

The Judge Advocate General. Do I understand this is being offered in evidence?

Colonel Royall. No, sir, not a bit. It would not be appropriate evidence. I merely said it was analogous to a brief. It has the pages in the record as to each of these statements. I do that instead of standing up here and reading the pages. I could read that and ask the Commission to write it down--they would not have to--but this is nothing in the world but a memorandum of what I am using in my argument, with the page numbers written in it. It is not offered in evidence.

The Judge Advocate General. It is never the custom in a military court to submit anything of this kind. It is simply a supplemental argument for the Commission to consider in bringing out the salient points of his side of the argument to their attention while they are coming to their findings on the facts. I do not think it is admissible or that it should be considered by the Commission.

The Attorney General. As a practical matter, it puts us in a little bit difficult circumstances, because here I think we all assumed properly that the final arguments would come today. Here is a long analysis of the evidence made by counsel. Now, we really do not want to go back and make another long analysis of the record and submit it to you later.

It seems to me you have given a great latitude toward

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arguments, very properly, of counsel. The Judge Advocate General informs me that it is not proper to submit written briefs. I defer to him in having more knowledge than I do of courts-martial. As a practical matter, however, it is a little hard for counsel at the last minute to be presented with this analysis of the record. If it were done we might want to ask delay to make another analysis of the record and for a counter brief to be filed, and so on.

It seems to me, in view of the very careful and able analysis made orally before the Commission, that it would not be inappropriate for the Commission, in its discretion, to decide that that was sufficient and that they would not accept this document.

Colonel Royall. I say again to the Commission, I am not arguing at all about it. I am just tendering it as part of my argument. If the Commission does not want to consider it, it is all right.

I am perfectly certain that it is an appropriate thing to do in any court that I have ever argued before. It happens every day before a court. You hand them up a memorandum of the evidence.

Before I finish, I merely want to say this. If the Commission does not want to consider it, and so advises me, there are some pages of the record that I will probably read. It may take a little time to do it. I thought this was a more convenient way to do it.

A Member. How much of it is there?

Colonel Royall. I do not know how many pages; a number of pages.

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A Member. We could get it in there in the time we have had for this argument on the subject. It seems to me you certainly can do that.

Colonel Royall. I will do whatever the Commission says. I am going to read parts of it later, at the appropriate time, in the record.

The President. The Judge Advocate General.

The Judge Advocate General. I have here copies of summaries for my own use that I have prepared. I will be glad to submit them to the Commission.

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Colonel Royall. I think it would be just as appropriate as the other would be. May it please the Commission, I do not want to argue about this question, because I have not tried to offer it in evidence. I just ask the Commission if it would be of any service to them. If they do not want it, it is all right with me.

The President. The Commission feels that if you wish this to be considered in part or as a whole it should be submitted in the record as part of the evidence before the Commission.

Colonel Royall. That is entirely satisfactory to me.

The President. As part of the argument.

Colonel Royall. It is entirely satisfactory to me.

The procedure I am going to follow in that connection, and I think that is a perfectly appropriate and satisfactory ruling, is that when I complete the rest of my argument--I do not want to interrupt it by reading it now--I am going to read into the record the pages of the most material parts. I probably won't read it all.

The President. Well, the Commission will hear that.



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Colonel Royall. Now, may it please the Commission, we come to the testimony as it relates to the defendant Burger. The Commission will recall that he was the only defendant as to which an extended argument was made at the close of the prosecution's evidence.

At that time we suggested to the Commission that upon the prosecution's case itself, the Commission had authority--it was not required to do so under the Court-Martial Manual--to render a verdict of not guilty; and the answer that was made to that was that it was a matter which would more appropriately arise at the end of the case. That was the view announced by the Commission--that the motion would not be granted at that time. That was substantially what the Commission said, not inferring that you were going to do anything, but that was the discussion about it.

We have gone on and had Burger on the stand, and, instead of weakening his case in any respect, we contend it has been immeasurably strengthened by your opportunity to observe him. I looked over the record last night, and I think this is right: The Commission itself asked Burger more questions than they did nearly all the others put together. Those answers, if you just sit down and read them--I think you recall it--showed a frankness, even where he stated something that he could have colored a little, the like of which I do not ever recall seeing on the witness stand in many days.

Burger is in this situation. He is a proven man of character in this country. He served two enlistments in the National Guard in different States. Not only did each of his commanding officers give him a character of excellent, but they



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went out of the way to add a note, and one of them said, "Exceedingly reliable and trustworthy," or words to that effect, under "Remarks."

Not only is that true, but when he was leaving they wrote him a special letter commenting upon his integrity. After he had gone to Germany his commanding officer wrote him there and told him the high regard in which he was held by his comrades and his commanders, and stated to him, "I am sorry that you were out of work and had to go on that account. Conditions have now improved. It looks like you picked out a little bad time. If you had just waited a little while, you could have got a job."

That is the picture we start out with of Burger. Not only is that true, but Burger was willing to go on the stand in this case as a prosecution witness, before the evidence was closed for the prosecution, and offered himself for that purpose, which indicated as clearly as could be indicated that he felt right then that nothing could be brought out that was in any way derogatory or contradictory to his statement.

He did not go on at the outset of the case, and he told you his counsel prevented him from doing so, because he thought he would not be fair to the other defendants; but before the prosecution closed, he offered to go on the stand, and you can see why, because you have seen him on the stand.

I was amazed at his frankness about his being a citizen. He said he was a citizen over here, and I think it was the Commission who asked him--or somebody asked him; I do not recall that--as to whether he was a citizen of the United States or Germany. He did not color it, not even a shade. He

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told you the facts about it. I want you to read that answer. It is in the testimony. I will read you the page in a minute. See if that is not a model of a frank and fair statement of a man who is not trying to color his testimony either way, either to help himself or hurt himself.

That appears on pages 2594 and 2595 of the record. While I am going through Burger, I might refer to his pages, and then I will save that much time. His discharge and recommendation start on page 2702.

Another rather interesting feature of his appearance on the stand--and it shows the prosecution's attitude toward it, although I am not going to try to interpret their views--is that if you look at the cross-examination of our able Attorney General you will find that there was no effort to undermine Burger's statement as there was in the case of the other defendants. There were one or two points he was not exactly clear about, and you know how the German type of mind works. They get a stubborn idea and they go ahead, and you have got to lead them around to clarify it. But outside of the clarification of a few points, which were clearly clarified after you got to the point, the other cross-examination was solely in an effort to elicit other facts that might help the enforcement of the law.

I am going to suggest something here, and if there is any objection from the prosecution I think the Commission should sustain it, because it probably is not in line with procedure, although there may be some doubt about it. There have been posted certain circulars about some of these other people they are trying to get, and I have those circulars. I got the

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circular of Swenson.

Let me tell you what I want to do with it, Mr. Attorney General.

The Attorney General. All right.

(The Attorney General and Colonel Royall conferred, after which the following occurred:)

The Attorney General. I am afraid the prosecution must object.

Colonel Royall. All right, sir. If there is an objection, we won't do it. But I do want to say this, without reference to what I had hoped to present to the Commission. Burger gave on the witness stand the most accurate description, not only of these men here, but of others who were connected with this case in Germany, which would have made it possible for the F.B.I. or any enforcement agency to have picked those men up and identified them.

If the F.B.I. did not use his exact descriptions for the purpose of apprehending those men, they missed a mighty good bet. He was accurate to a detail; and he made that statement, may it please the Commission, before he knew anybody else had given that information. He knew Dasch was in Washington, but he also knew Dasch could not give an accurate description of a thing of that kind, as he has demonstrated on the stand.

He gave that statement, and he has never changed it, modified it, or enlarged it in any way. In other words, his statement given there when he was first apprehended stands today, and he says on the witness stand he does not want to change, and has not wanted to change at any time, one word of it in any way. It stood the test of all the investigation the

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F.B.I. has made, of all the examination of these various other defendants, of all the witnesses. He did not enlarge it by a long statement. He did not change his story. He did not modify it. He told the truth, he says, and he still says it is the truth; and every circumstance in this case, except maybe one or two minor matters of recollection, corroborates him in every particular.

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Agent Lanman said it was a full and frank statement of the facts. He is the man who testified further that he has known of all the investigations they made in this matter, either directly or through what others have told him, but he still says that it is a frank and fair statement that he made when he was first apprehended and not changed in any particular.

Burger said he never had any intention of doing anything except getting out of Germany, escaping Germany, and making certain that they did not use these explosives. Those were his objects, and everything else was incidental. There is the best illustration of his frankness that I know of.

The Attorney General said:

"Whom did you plan to report it to?"

He answered, "I didn't make any plan about that. I didn't know what I was going to do, as to who to report it to when I got to America."

He didn't say, "I planned all that I was going to do." He just told the truth about it. He said, "All I knew was that I was going to get away from Germany in a manner that was legal in Germany, to protect my family, and that I was going to make sure that those explosives were not used, and I had not thought it out any further than that."

That is another illustration of a man who could have said, "Yes; I planned all this and all that." But he did not say it. He told the truth about it.

Of course others have said that he came to America for some other reason which reflects on him to some extent, possibly; but that is the first story told back there when he was apprehended, and it is corroborated by every defendant on the



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stand and corroborated by something else that cannot be denied.

Burger had been terribly mistreated in Germany. You do not have to take his statement for that. He says that, but you have the statement of every witness on the stand who knew about it, and of Dasch who says that they had a complete record in Kappe's office and that Kappe called it to the attention of the school and thought they ought to know about it, presumably so they would watch him.

He tells you the story that he was a member of the old Storm Troopers; that he was with Roehm; that Roehm was killed.

And I want to suggest to the Commission that his original statement, if there is any question in anybody's mind, ought to clear him, if there were nothing else.

But here is his testimony from page 2595 to page 2602, inclusive. He tells the story on the stand, the same story he told in his statement, and the same thing he told on cross-examination, exactly.

He said that Roehm was killed; and everybody knows that is a fact. Also three thousand of his followers were killed, and he escaped because of his friendship for a doctor. He tells you that right then he formed the intention of escaping from Germany, because of his political future in Germany, his political friends being killed, and losing his political contacts. I do not mean in the sense of party politics, but that the crowd he ran with was persona non grata, and he decided right then that he ought to get out of Germany for that reason. That was before he had been mistreated. He says he was constantly watched, as all the old Storm Troopers were, and that he tried to make some arrangements to get out; that being a member of the Nazi party it was impossible to get out of

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Germany legally, according to the German law, without the consent of the Nazi Party. Everybody knows that is true. That is common knowledge, that they will not let a member of the Nazi Party get out without their permission; and that if he had slipped out of Germany, that is, gone out illegally, his family would have suffered.

That man is a soldier, a soldier in his personal and family relationships and in every relationship. He was a soldier over here, and as long as they were treating him decently and treating him as a soldier, he was a soldier in Germany. But as soon as they started killing his soldier friends--he had served in the street fightings and the skirmishes that started the Nazi party, and he had been decorated for it--after they killed his comrades and his leader, then he had the natural desire that anybody would have to get out of Germany and get away from it.

There is another illustration of the type of this man that appealed to me in that connection. You know, he did not get any pay for coming over to this country--that is uncontradicted in this record--except that he insisted that all he was going to do was to remain in his capacity as a soldier. He did not get paid to come over here except what he was getting in that capacity.

He figured, he says, that he was entitled as long as he was living under that terrible domination to take what they were paying him as a soldier until he could get away. He did not go into it as a business contract to improve his financial position. He went into it under the duty imposed on him. As long as he was in the organization he said he wanted to be

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legally in Germany as long as he was in Germany, and when he got out of Germany and escaped from it he wanted to prevent the use of those explosives in this country.

I think if you will look at the cross-examination of Burger on page 2637, if you want to make a note of that, he made the most satisfactory answer as to his intent and purpose, in answer to a question by the Attorney General--so satisfactory that the Attorney General did not pursue that cross-examination further. I had not asked the direct question. He had already stated it in his statement and I was not trying to prolong the case. But the Attorney General brought it out, and it absolutely corresponds with what he said and contended all along.

That was his political difficulty. And then came the war and he went to Poland as a member of the Propaganda department of the army, or the Intelligence department, and the treatment of the Poles induced him to make some remarks. You do not have to take Burger's statement for that. The testimony is that Kappe announced in the school that Burger had gotten into trouble--this is not his evidence--because he had said something about the treatment of the Poles, and they put him in jail, charging him with falsification of papers in a place in which he had never been, in Vienna. They investigated him three times and acquitted him, and finally the judiciary dismissed him, but the Gestapo would not let him go and put him in a concentration camp and kept him a year. They took away all of his medals and his decorations. They put him into a room with sixty persons, allowing one hour and a few minutes exercise every 14 days. They forced him to sign a pledge that he would tell nobody about his treatment.

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And Burger, the soldier that he is--when he was on the witness stand, I tried to get him to magnify that a little. I thought maybe he would make it a little more graphic as to how they treated him and it would be more impressive. But I could not do anything with him. He just told it as it was; did not try to color it, did not try to exaggerate it, and he ended up by saying, "I am not complaining about what they did to me; I am complaining about what they did to my wife."

That was somewhat like a courageous man, I think. I tried to get him to complain, but he would not do it. I had to draw it out of him on the witness stand. He said, "They told my wife that I was going to be eight years in the chain gang. They knew she was pregnant, and they caused her to have a miscarriage and become terribly ill. They told her that she had to divorce me; made me write her a farewell letter."

And then he said that under those circumstances, added to his party differences, he formed the firm desire that for personal reasons he had to get out of Germany.

Who wouldn't? That is corroborated by every one of these defendants. They may not like Burger; they may feel that Burger has in part been responsible for their apprehension. The Commission may have observed in this trial some attitude of hostility to him; but in spite of that fact, every one of them corroborates him in every detail except some very minor ones which I will mention in a minute.

He went to this school and Kappe told the others to be on the lookout for him, and he had to be cautious in what he said. But now and then he would slip. He slipped once to Dasch and said something about the Gestapo. A man can slip



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sometimes under those circumstances.

But he was trying to get out of Germany in a way that would protect his family. He tells you that he had made efforts to go voluntarily into the Intelligence department, maybe just to get to Ireland or anywhere they were sending people. Finally he got this opportunity to come here, which he sought out himself. He does not say he did not understand what it was. He does not say that anybody talked him into it. He does not equivocate. He says, "They treated me and particularly my wife that way and I was going to get out of Germany in a way that would not result in trouble for my family." And he sought a way to get out of there, affirmatively sought it.

The others suspected him in camp. They thought he was hostile. They said that while he did not say he was hostile, except slipping once or twice, every one of them mistrusted him; and the first thing that two of them said when they were arrested, without knowing anything about it, was "Burger turned us in." They did not know anything about it, but when the F.B.I. walked up to them they said, "Burger turned us in"--because they had known all the time that no man so mistreated could be loyal to that country.

When he came over here he brought with him his National Guard papers, which they may say was trying to "cover up." But he brought German writing, German memoranda, a photograph of his wife taken in Germany, with German writing on it. He did not try to destroy them or hide them. He stayed there in the hotel room.

I am not going into his conversation with Dasch. He finally found on Saturday night that there was one other man in that group that he had suspected a little while--Dasch--



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but he had been afraid to say anything. He found he felt that he wanted to do something.

I am not arguing for or against Dasch in that connection. You have heard his story. But as soon as Burger found it out he said, "I didn't want this to get back to Germany. I want to try to handle it in a way that will not upset my leaving Germany legally."

He was trying to do just what he said he was trying to do. Dasch had told him. He would not let him tell him at length--and that is not reflecting on Dasch, because Colonel Ristine will admit that he talks a good deal--but Dasch had told him, and it was the truth, that he was going down to Washington, and Burger waited for him to do it. It is not denied that he went there and registered in his own name. But after he got Dasch's letter saying he was going to Washington to report it, did he leave the hotel? He stayed right there in the Governor Clinton Hotel, registered in his own name, with his door unlocked.

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The F. B. I. said that when he walked in, he did not even display any surprise. There were all his German papers, all his American papers, all his money; no effort to hide it; everything right there. That corroborates him in every way.

I am not going into the question of the objects he left on the beach for the coast guard, but he said this, and it is corroborated 100% by the coast guard: that before they saw the coast guard, he went over to get those explosives, to keep any damage from being done to this country. That was before he knew that the coast guard was there, and the location where they found them shows that that must have been true. The coast guard's own testimony shows that those articles had been placed on the beach. The coast guard's testimony shows that Burger was telling the truth. The first thing the coast guard noticed was a man dragging a bag. While the coast guard was standing there, a man came by dragging a bag.

Burger did not know what the coast guard had said or was going to say, but he told the F. B. I., the first time he saw them, that he dragged the bag on the beach and dropped these objects as markers. He told that to the F. B. I., not knowing that the coast guard had ever said anything or that they had ever known anything about the coast guard, and the coast guard came on the stand here not knowing what Burger would say. What attracted the coast guard's attention was a man dragging a bag.

Not only is that true, but after Burger knew that the coast guard was there, Burger continued to drop objects, and the coast guard used those objects for just the purpose Burger said they were to be used. The coast guard used them and went

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right to those boxes and found them. Burger made those statements before he knew that the coast guard had uncovered them or done anything about them.

I am not going over the Dasch situation, because that has been covered pretty thoroughly. What was said about what Dasch told him after they talked about it applies equally to him. The letter from Dasch that was left in the hotel is very material.

Let us take up one or two little discrepancies that the prosecution might point out here. I do not think there are many.

There was a little difference in recollection as to what the conversation was with Quirin and Heinck when Burger saw them on one occasion. He said that they were very indignant about George Dasch running out on them and made some threats. They say they were indignant but they do not remember making any threats. That is just an immaterial variation in the recollection of the conversation. Both Heinck and Quirin admit that the conversation took place. Both of them admit that they were indignant because of Dasch.

The letter that Dasch left in the room and that was found in the room appears in the record at page 1475. Burger said he was in the bathroom when Heinck and Quirin found the letter. One of them said he had a recollection that Burger was lying across the other bed. What difference does it make? Where everybody was in the room is something that cannot be remembered. They both told you that they went in there and found this letter from Dasch that he had put in a drawer, which he had not told them about. They both stated that. It corroborates him

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substantially.

Then the question is whether Quirin was assistant leader of the group. Quirin said he did not think you would call him assistant leader. He was in charge of Heinck. I don't know whether that is a difference in words or meaning.

Then, there was some suggestion on cross-examination that Burger denied he had a story to tell over here. Burger said he was given a story by Kappe, but he told Kappe, "I am going over there and am going to use my own name. I am not going as a Jew or pretending to be a Jew."

Kappe said, "Why? They know you in America."

He had to give Kappe some reason, and this is what he told him, and it appears in the record:

"I am going as a soldier, and I want to redeem myself with the Party."

He had to tell them something. Kappe saw that and let him come. So, there is no contradiction there with any witness or any other testimony. In other words, I say that there is nothing in this case to suggest that Burger was doing other than telling the truth.

There has got to be a criminal intent in this matter. Burger did what any person in this room would have done under similar circumstances. Mistreated as he was, his wife mistreated as she was, he did what any man would do, and every bit of his conduct and every word of every other statement corroborates that 100%, as also every word of the testimony. His appearance and demeanor on the stand indicates that. We say that there is no doubt at all in our minds that the defendant Burger, regardless of concern with any other case,

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should be found not guilty of any of these charges.

Of course, he will have to be interned, but there is plenty of procedure to intern him. He is an alien enemy, and the Government is interning most of them.

But there is another thing: He has not tried to pretend anything about his citizenship. He says he is not an American citizen because he was drafted into the German Army. He does not want to be a citizen of Germany, because he has renounced any loyalty to them. Can it be that Burger is in a situation where he can be put to death by Germany for being a traitor, as he certainly was, and put to death by us as being a traitor? That is an impossible situation; it cannot be true.

Therefore, we say to this Commission that on his statement, a verdict of not guilty should be entered.

That is my argument except for a brief conclusion.

The President. Would you prefer at this moment to have a recess, or would you prefer to finish your argument?

Colonel Royall. I think if we took a five-minute recess, it would be helpful. My argument will not last very long, but it is going to take me probably five or ten minutes to read these page numbers.

The President. Then, we shall take a recess for ten minutes.

(At this time a short recess was taken. The following then occurred:)

The President. The Commission is open. Will the defense proceed, please?

Colonel Royall. If it please the Commission, I am going to read this memorandum, but it will take a little while



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longer than I had thought it would. I went through it to see if I could eliminate some of it.

The President. May I ask how long it will take?

Colonel Royall. It is going to take quite a little while. There are eighteen pages.

The Judge Advocate General. If it is agreeable to the Commission, we are willing to let counsel submit that to the Commission if we may submit our memorandum also.

The Attorney General. That will save the time of reading these long statements.

Colonel Royall. That is satisfactory. Anything the Commission wants to do about it is satisfactory to me.

The Judge Advocate General. We are anxious to save all the time we can.

Colonel Royall. I have absolutely no objection.

The President. We will admit both as side-memoire and as part of the argument.

Colonel Royall. Here is one for each member of the Commission.

The President. I take it that this will be tendered as part of the argument at this time, and I understand that you will then tender as part of your argument certain notes?

The Judge Advocate General. We made brief notes, and some of them are underlined.

Colonel Royall. May I see them? I should like to have an idea of what they are.

I shall present to the Commission seven copies of our statement, and I have another one to place in the record if you want it in the record. This is just for the convenience

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of the Commission, if the Commission wants to use it, with reference to page numbers.

A Member. We have already heard that as part of your argument?

Colonel Royall. Certainly.

A Member. If you want to place it in the record, we can use it for reference to these different page numbers in connection with your argument. Is not that what you want to do?

Colonel Royall. That is all I want to do.

The President. As I take it, there is no objection on the part of the prosecution to this being accepted as part of the argument of Colonel Royall?

The Judge Advocate General. That is correct, sir.

Colonel Royall. May it please the Commission, in order to close this argument very briefly, I want to be certain that I have called your attention to the arguments of the various defendants. I asked them if there were any other matters they wanted me to bring to your attention.

Some of them say that they want it clearly understood that they did not have any opportunity to get out of this thing after they once got into it, which seems to me to be quite apparent.

In the case of Haupt, his registration for the draft would have meant that he would have had to go, if he had no dependents, unless he could have got out of it on account of some physical defect. There is something in the evidence about that. But those things do not usually succeed. So, when he registered, he knew he could not have carried it out. He would have had to go in ten days, at his age and with no

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dependents.

I call your attention again to Burger's case, with reference to the carrying of this bag. The coast guardsman said that a man could easily have carried it on his shoulder, so there would have been no need to drag it, which was the hardest way to carry it, unless he had the intention which he said he had.

May it please the Commission, we say in this case, in conclusion, that there is a varying situation as to these defendants. This being a judicial body, we say it must give consideration to this varying situation. This Commission has the right and ability to discriminate, not in an unfair sense, but on the basis of facts. That is the finest attribute of any judicial body.

I realize that this is a voluminous record. I realize that it is going to be difficult for this Commission to remember everything that was said. It is impossible to do so. The memorandum I presented was made with that fact fully in mind. We realize that nobody could remember where to find any particular part of the testimony without some reference to a page number, so we tried to keep a running memorandum during the trial for that purpose.

We say that these men are not guilty. We say that none of them is guilty of an offense which requires the most severe punishment.

I call your attention again to the testimony of Kerling on page 2328 as to what would happen to an Englishman--what does happen to an Englishman--similarly caught, and to the common knowledge of what has happened to Hess. I say that

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these men--some of them--undoubtedly have violated some rule of law to some extent. Perhaps I should not say that to the Commission, but I should certainly be lacking in frankness if I did not say so. But none of them, in our opinion, has committed a violation which justifies, from the standpoint of justice, from the standpoint of policy, from the standpoint of national defense, the extreme penalty or anything approximating it.

As to four of these defendants, three of whom we represent, the fourth being Dasch, I think the Commission should particularly bear in mind the defendant Thiel and the type of man he is--easily led and just going along with the crowd.

I think in the case of this young boy Haupt, whose age in itself would justify a distinction, whose American citizenship would in itself justify a distinction, and the corroboration of whose story would justify you in accepting it, he ought to be acquitted. If he is not acquitted, we submit to the Commission, he ought to receive a very minor punishment.

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Finally, in the case of the defendant Burger, if evidence means anything, if corroboration means anything, if the evidence and testimony of character mean anything, if the attitude of the F.B.I. and the fairness of the F.B.I., which in respect to Burger is demonstrated to the nth degree, and the fairness of the prosecution in their attitude toward Burger and their questions of Burger--if they mean anything, then the defendant Burger has committed no offense. With the evidence and the record as it is in his case, I think it would be a credit to the administration of justice and a credit to this Commission to acquit him, no matter what is done as to the other defendants.

Now, it has been a difficult task to argue about all these defendants. It is difficult to be fair to all of them and present the case of one. We have sought to do it. We are convinced that they are different. We are convinced that none of them should receive the severe penalty. With that remark we leave the matter to the Commission.

May I add that there are copies of the statutes relating to espionage and sabotage, which were requested?

The President. They will be received in the same way that the others were received, as part of your argument.

The Judge Advocate General. May it please the Commission, before the prosecution starts--

The President. Pardon me one moment, General. Do I take it now that the defense has finished?

Colonel Royall. Yes, sir. The defense has finished. The Commission will recognize that at the beginning of the defense argument it was stated that, in view of the fact that



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the prosecution had not covered the facts in detail in their first argument, if any new matter should be brought up, we might ask for a reply to it. That was to be in the discretion of the Commission. At this time I hope that it will not be necessary for the defense even to request any further argument to the Commission. That is our hope.

The Judge Advocate General. That is the matter about which I was to refer. In the nature of this case, the original opening argument made by the prosecution, under the particular circumstances and the testimony of these defendants, fully covered the facts. The defense is simply one of intent. Any occasion for any further argument on the part of the defense would be improper. I wanted it understood that we would have the final closing argument.

The President. Are there any remarks on that, Mr. Attorney General?

The Attorney General. As I understand, whether or not you wish to follow the rules of courts-martial, the rules are that the prosecution shall have the concluding argument. We want to say at this time that we want the defense given every opportunity to argue it, as you have already given them, in any way that they want. This is our concluding argument, and we feel that the defense should not be then permitted to make a concluding argument. You have to decide at some point who is going to conclude. I hope that the Commission will now decide that our argument concludes the case finally and permanently. Otherwise you go on indefinitely with rebuttals and counter rebuttals. We now propose to make the final and conclusive argument on behalf of the prosecution, and we think that that

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should close all arguments.

The President. Are there any further remarks on that?

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Colonel Royall. I just say to the Commission that it is impossible for me to make any intelligent remark on that, because I do not know what they are going to say. I do say this to the Commission: that if they bring in what we consider new material, we shall request the Commission for the right to address them further on that new matter, in which event, of course, they will still have the right to close. However, the purpose of the opening argument is to cover the case. If they elected not to cover the case at that time and to cover it now, this is really part of their opening argument.

I do not see how we can argue that at this time, until we see what is said.

The Judge Advocate General. I think you will find that no new matter will be covered.

Colonel Royall. I hope not. I do not want to speak any more about it.

The President. The Judge Advocate General will proceed.

CLOSING ARGUMENT ON BEHALF OF THE PROSECUTION  
by  
THE JUDGE ADVOCATE GENERAL

The Judge Advocate General. May it please the President and members of the Commission: After listening to the arguments for the last two days in behalf of the defense, it seems to me that their idea of the proper specification to be brought before this Commission would have been worded somewhat as follows:

"In that, Burger and all the rest of these defendants, with intent to defraud the German Government, did, in Quentz, Germany, in about the month of May, 1942,

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unlawfully pretend to said German Government that they, well knowing the said pretenses were false, and by means thereof, were saboteurs, and by means thereof did fraudulently obtain from the said German Government the sum of \$180,000 in money, four or eight boxes full of explosives, and a free trip across the Atlantic in a submarine."

Before we enter into the discussion of the evidence, counsel went to a considerable degree into the question of punishment and what was necessary to be considered in this case in the way of punishment. They said it was not necessary to punish these defendants as a preventive, because there will be no expeditions of this kind.

However, the Commission will remember the story as told by these defendants, that this was the first of a series of these schools; that others were coming over here later; that they were going to meet in Chicago; that Burger, if I remember correctly, was to start some sort of a commercial artist establishment and put a notice in the Chicago paper every fifteen days for the benefit of those who were to come later--most probably Kappe and his assistants.

Kerling says that Germany does not kill Englishmen for doing these things; they intern them. We have nothing in the evidence to show that. We read in the papers every day right now that the Germans are having military commissions in France to punish saboteurs. We do not know what they are doing to them. We do not have anything here to show that. That is the fault of all this testimony--we have nothing here except the testimony of these defendants as to the facts of the case.

5b Their whole case is based on their own evidence. We have not been able to get the true facts as to that; and, of course, we cannot go into Germany and ask them what they are doing now.

They went into the civil statutes regarding sabotage, and they referred you to these statutes in Title 50, U. S. C., 101 to 105, which contains certain sabotage statutes. I want to go into that a little further--

The President. What is the reference?

The Judge Advocate General. That is Title 50 United States Code Annotated, Sections 101 to 105.

They said, first, that destroying or injuring war material carries only a thirty-year penalty and a \$10,000 fine; but I want to invite the Commission's attention to the fact that that is not an exclusive statute. That includes only people who are here in the United States doing these things. It does not consider the extra crime or offense against the law of war, as it is more properly called, of anybody coming across and through our theater of operations, as these men did. In any event, it does not exclude this Commission from any jurisdiction or any reason why they should be guided by the penalty in that statute.

Section 31 of that book reads:

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"Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval



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station, submarine base, coaling station, fort, battery torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section 36 of this title; \* \* \* shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years or both."

Section 38 says:

"Nothing contained in this chapter or Chapter 12 of this title shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial under Chapter 36 of Title 10 and Chapter 21 of Title 34."

I brought that out to show that that is not exclusive and particular as to the jurisdiction of the military commission in this case.

Coming to the 82nd Article of War, quite a bit of emphasis



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was placed upon the question of spying and the proof necessary under "spying."

In that connection, Colonel Dowell, if I remember correctly, called particular attention to the fact that it was necessary to prove:

"(a) That the accused was found at a certain place within our zone of operations, acting clandestinely, or under false pretenses; and (b) that he was obtaining, or endeavoring to obtain, information with intent to communicate the same to the enemy."

That must be read with the prior part of the section, and I am reading from page 157 of the Manual for Courts-Martial:

"The principal characteristic of this offense is a clandestine dissimulation of the true object sought, which object is an endeavor to obtain information with the intention of communicating it to the hostile party. Thus, soldiers not wearing disguise, dispatch writers, whether soldiers or civilians, and persons in aircraft who carry out their missions openly and who have penetrated hostile lines are not to be considered spies, for the reason that, while they may have resorted to concealment, they have practiced no dissimulation.

"It is necessary to prove an intent to communicate information to the hostile party. This intent will very readily be inferred on proof of a deceptive insinuation of the accused among our forces, but this inference may be overcome by very clear evidence that

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the person had come within the lines for a comparatively innocent purpose, as to visit his family or that he has assumed a disguise in order to reach his own lines."

But this inference may be overcome by very clear evidence. The intent is presumed, and it must be overcome by evidence, and that evidence must be clear.

Again:

"It is not essential that the accused obtain the information sought or that he communicate it. The offense is complete with the lurking or dissimulation with intent to accomplish these objects."

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In that connection, there has been some evidence introduced here with reference to the conversation of Kerling and Neubauer, if I remember correctly, on the way up from Florida, to the effect that they were looking at these defense plants on the way up and decided that they were too well guarded to sabotage. That is a communication in itself. We remember where Burger was taken by Dasch and shown Hell Gate Bridge, which is communication as to possible sabotage.

Also, as to spying, I would like to read paragraph 88 of the famous General Order 100 of 1863:

"Spies. A spy is a person who secretly, in disguise, or under false pretenses, seeks information with the intention of communicating it to the enemy. A spy is punishable with death by hanging by the neck, whether or not he succeeded in obtaining the information or in conveying it to the enemy."

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In this same connection, under "spying," the question was brought up that this must occur in the theater of operations; and the defense counsel have attempted to show that Long Island and Florida were not in the theater of operations.

I will admit that that contention was made before the decision of the Supreme Court yesterday on the habeas corpus matter. It seems to me that that probably will straighten out the question as to whether this is a theater of operations. However, I fail to understand why counsel has insisted that, in view of the change of name from Theater of Operations to Eastern Defense Command, this is still not a theater of operations.

One counsel has endeavored to distinguish between the zone of the interior and a theater of operations. Of course, we know that in France the zone of the interior was probably back to the United States and the S.O.S. was back of that.

In this country, where we have a theater of operations right on our seacoast, and we have installations like the port of embarkation at Brooklyn, which is on the waterfront within a few miles from where these men came in, the supply establishments and the theater of operations are in the same place. In order to relieve the commanding general in the field of the trouble and the duty and the work of taking care of all these installations in the territory, they have taken the control away from him and put it in the S.O.S.; and, as Colonel Sherrill testified here, the tactical situation is just the same since the date of that order as it was before.

Under Article 81, under communications and the giving of money and things to the enemy, this is provided:

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"Relieving, corresponding with, or aiding the enemy.  
Whosoever relieves or attempts to relieve the enemy with  
arms, ammunition, supplies, money, or other thing \* \* \*."

We have shown here that not only did they come to this  
country, but that they gave each other money, which directly  
comes under that. The word "relieves" means assists.

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In that connection I want to read from the transcript of the proceedings before the Supreme Court in the habeas corpus matter in connection with this case.

Colonel Royall. Do you think that ought to be done? I will leave it up to you.

The Judge Advocate General. I think that is proper, Colonel Royall.

Colonel Royall. I know you would not do anything that you thought was improper.

The Judge Advocate General. This is on page 241 of the transcript.

The President. Is that page 241 of the record?

The Judge Advocate General. The transcript of the proceedings held before the Supreme Court of the United States, July, Special Term, 1942.

The President. Is this in our record?

The Judge Advocate General. No, sir; it is not.

The President. Please read the reference again.

The Judge Advocate General. Page 241 of the transcript of the proceedings before the Supreme Court of the United States, July, Special Term, 1942.

If there is any question about it--

The President. I am not questioning it. I am simply asking for the reference. I would like a statement from you as to just what it is and what you are reading so that we will be sure, if it is not in the record, that we know what is going into the record.

The Judge Advocate General. I was going to read a portion of that transcript. What I am trying to show is that relieving means assisting, by assisting in the way of money,



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munitions, or anything of that kind. That is what it means here and what has been proven.

With reference to Charge 1, under the law of war, counsel has said that they do not know what law of war is violated. I would like to refer to Section 84 of General Order 100--

The President. Pardon me, General. I am not sure yet. There was a reference made by you to something that you were going to read into the record. Now do I take it that you are not going to read it into the record?

The Judge Advocate General. I said that if there was any objection I would not go ahead with it.

The President. I did not hear any objection.

Colonel Royall. I did not make any objection, sir. I merely inquired of The Judge Advocate General whether he thought it would be proper to read from argument in another case, and I told him I would leave it entirely to him to decide, because I was confident that he would not do anything improper. That was all that was said about it.

The Judge Advocate General. Of course the testimony is not in evidence here.

Colonel Royall. It is not testimony; it is argument.

The Judge Advocate General. Yes; argument.

The President. Then I understand that you are not going to read it?

The Judge Advocate General. No, sir.

The President. I just wanted to make it plain in the record, because you said you were going to read it, and there was no statement that you were not going to read it.

The Judge Advocate General. I said that if there was any question about it I would not read it.

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I am now going to read from Section 84 of General Order 100, applying to the first specification under the Law of War:

"Armed prowlers, by whatever names they may be called, or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of prisoners of war."

Again, Paragraph 352 of the Rules of Land Warfare:

"Armed prowlers"--

The President. What date is that?

The Judge Advocate General. 1940. The foreword is:

"FM 27-10, Rules of Land Warfare, is published for the information and guidance of all concerned.

"By order of the Secretary of War:

"G. C. Marshall,  
"Chief of Staff

"Official:

"E. S. Adams,  
"Major General,  
"The Adjutant General."

It is dated "War Department, Washington, October 1, 1940."

Paragraph 352 reads as follows:

"Armed prowlers, by whatever names they may be called, or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war."

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Also Section 357, headed "War Crimes Subject to Death Penalty:

"All war crimes are subject to the death penalty, although a lesser penalty may be imposed. The punishment should be deterrent, and in imposing a sentence of imprisonment it is not necessary to take into consideration the end of the war, which does not necessarily limit the imprisonment to be imposed."

The argument has been made that these men did not commit any crime under Charge 1. That is the charge we have here of their entering this country wearing uniforms, from which they changed to civilian clothes. The charge is that--

"being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States, along the Atlantic coast, and went behind such lines"--

The President. This is quoted from the first charge?

The Judge Advocate General. From Specification 1 of Charge 1.

These, may it please the Commission, are offenses against the Law of War. They are not crimes as such, but they are offenses and made so by the customs of war amongst nations, and penalty has been prescribed, not only by various conventions, but by custom.

These people were stopped before they actually did any sabotage work; but the offense was in not only planning to do this, being schooled to do it, but coming through the lines in the way they did, and getting into civilian clothes.

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They knew what the proposition was when they started. They knew what they were up against. They were told to wear the uniforms so they would be treated as prisoners of war when they got here, if they were caught, and immediately they got by they were to take off their uniforms and come in as spies and saboteurs to do this kind of work.

The whole proposition comes to this, that it is not a question of whether they actually got to the place where they could sabotage something, but they did come through the lines for that purpose; and the only reason they did not do it was because they were caught by the F.B.I. before they could get to the place of the crime.

Reference has been made to Adolf Hess, that he was not punished; that he was put into an internment camp. We all know that Adolf Hess went to England, landed in an airplane in full uniform, and was treated as a prisoner of war. So there is no comparison there as to the amount of punishment.

I want to make my argument as brief as I can.

The defense has taken these defendants up in order, and I shall try to take them up in the same order, just bringing out one or two short points which I think show their intent to go ahead with this proposition.

I will refer again to the fact which I referred to at the end of the prosecution's case, that in consideration of all this evidence, except the corroboration as found by the F.B.I. and the explosives and things of that kind, all the evidence depends upon the statements of these witnesses; and in considering the statements of the witnesses this Commission has to consider those statements as to whether they all may



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be true or part may be true or none may be true.

I will read again the same paragraph that I read from Wharton's Criminal Evidence, Section 606, which I read at the end of the prosecution's case:

"It is also well settled that if a confession is made under such circumstances as to authorize its admission in evidence, the accused is entitled to have the entire conversation, excluding any exculpatory or self-serving declarations in connection therewith, also admitted. However, it is for the jury"--

Or for the Commission in this case--

"to say what weight shall be given to the several parts of the statement as they may believe that part which charges the prisoner and reject that part which may tend to inculcate him."

It is with that in view that this Commission should approach this evidence.

The accused have made various statements. Taking Kerling, first, I will just make one or two brief references.

He says in the record, at page 1563:

"At the time of my apprehension we were attempting to get located in a place we could use for a hideout as we had no specific plans at this time as to any sabotage, it being intended that we should get located and then return to get the explosives. This was in accordance with instructions we had received in Germany.

"At the time of my landing I intended to follow my instructions and to sabotage power lines and other facilities that might be suitable, but in the course of my stay



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I came to the conclusion that our orders were made impossible to fulfill."

He said, further:

"After Thiel and I arrived in New York City, I talked twice to Leinert and told him the purpose of my being here."

Record page 1641:

"In Jacksonville it was agreed that he was to meet Haupt and drive him to Florida in order to dig up the material buried on the beach and take them to the scene of their operations."

Those are not the statements of a man who has changed his mind. At least he has got so far in this country as to go through with everything except the actual sabotage; and the fact that circumstances change, that events turn out whereby they are apprehended, does not lessen the offense under the charges.

With reference to the testimony of Heinck, at page 961 of the record he says:

"We went to the Faje's apartment for dinner. During the evening it was mentioned that we had come to the United States on a German submarine."

I do not want to go into all this evidence too much, but I am just trying to bring out little incidents to show that none of these men had changed their intentions, so far as the evidence shows on their own statements, until some time after they got into the United States.

Quirin said at page 902 of the record:

"At the time I entered the United States there was

Sw no doubt in my mind that I was violating the law and I consider myself an agent of Germany. I promised my superiors that I would carry out their instructions and intended to do so when I left there. Had I not been apprehended, I might have carried out those instructions. I feel that my loyalty is to Germany. In case Germany won the war, we would come back to Germany and I would be given a better job, and be well cared for."

I do not need to read further on that.

Neubauer said at page 1732 of the record:

"I admit that I came to the United States with this group for the purpose of committing acts of sabotage, and might have done so if the opportunity arose."

Thiel told Tony Kramer he had come over on a submarine, that he had gone through a course in Germany before he came over, and gave Kramer his money belt, asking him to keep it until he, Thiel, came back.

That is found in the record at page 2270.

On page 1809:

"Thiel said it was a difficult thing for him to decide whether he would carry out the plan, but he thought that there were some things he would do, although he did not want to kill anybody. He also said he supposed as time went on he would probably do some of those things."

Defense counsel has seen fit to take up the case of Haupt a little separately from the others and to try to make out that this young man was just a misled young man of 21 who was more or less out for a good time and trying to get a lot of sympathy. He told us how he got a woman into trouble and ran away to escape that and to escape the draft.

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But if you will refer to the record at page 2014 you will find that Haupt testified that he told Gerda Stuckmann that he was going to Mexico.

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But when Gerda took the stand--pages 2186, 2187, and 2189, she testified that she did not know that Haupt was going or had gone until she went to see his mother after he had left. She further said that he told her on other occasions that he might go to Mexico but did not tell her anything at that particular time. The first she knew of that was when she received a card from him from St. Louis, saying that he was on his way to California.

I have not the page number or reference to it, but if my recollection is correct Mrs. Haupt testified to the fact that Gerda came there after Haupt left, in order to find out. There is evidence of where Haupt is testifying falsely before this Commission.

Then again, to show you what an ideal young man he was about getting into the draft, I refer you to page 1 of his statement of July 3, 1942, Prosecution Exhibit 218, which I think is on page 1658 of the record. Haupt said:

"While talking with Wernecke shortly after meeting him, he asked me if I had registered for the draft, and I told him I had, but had not as yet received a questionnaire. He said that I would probably be drafted right away and ought to do something about it. He said he would take me to a doctor for an examination, and that I should tell the doctor that I had coronary thrombosis, rheumatic pains, swelling of my ankles, pain in my left upper arm, dizzy spells now and then, headaches every week, indigestion, pains in my chest, and pains in my back. According to Wernecke, no doctor in the world could tell whether my heart was bad or not, because a bad heart doesn't act up all the time. He said that I

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would probably have to be examined by a draft board doctor later on, but it would be a good idea to go to another doctor first in order to establish that I had been receiving treatment."

Then he went to a doctor and got some pills. That is the young man who came back to this country because he wanted to be here, and the first thing he did was to take some pills to do something to evade the draft.

Counsel also appeals for Haupt by saying that his testimony was weakened by the fact that all the other defendants have played the same excuse, namely, that they never intended to do this thing. Somebody has got to be the first one to testify. Whether it was Haupt, Quirin, or any of the rest of them, the testimony of the first one is just as good or is weakened just as much or should not be weakened any more than the rest.

The question comes up whether the defense that they have put up by their own self-serving declarations is something that this Commission is willing to take and believe as true. There would be some possibility of it if one of them had done this, but when all eight of them come in and have the same excuse, namely, that they were not going through with it, did not intend at that time or some other time to do it, it becomes a situation where nobody can ever be convicted when he comes into court on a charge of this kind if he says he did not intend to do it. If that kind of excuse is to be accepted, there is no use prosecuting. If all a man has to say is, "I did not intend to do it," without any substantive evidence, there is no chance that he will be convicted. On the other hand, all the other circumstances show or prove to the con-



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trary of what they claim, except in the case of Dasch and Burger.

I am trying to make this as short as I can.

The President. The Commission hopes that you will take all the time necessary to make your points.

The Judge Advocate General. Thank you. I might take these men together as a general proposition, because they both seem to be classed together, more or less. They were together.

The President. What men are you now speaking of, sir?

The Judge Advocate General. Dasch and Burger. They were together in New York. Their paths in certain ways are similar. Burger was back in Germany from 1933, if I remember rightly. He immediately became a member of the storm troopers, worked there, was employed, and luckily escaped the purge. Then he came back, was a little out of luck, went to school at the University of Berlin, studied geopolitics, and immediately worked himself back into the good graces of the government among the higher officials.

He became a favorite of Dr. Hausofer, if I remember rightly--I may be wrong--who is head of the geopolitics end of the university and the father of the geopolitics theory of Germany.

From then until 1942 Burger was in Germany except for the time, he said, when he was in an internment camp. Being placed in an internment camp, by the way, counsel has represented, subjected him to terrible persecution, suffering, and tortures. Throughout Burger's testimony I cannot find where he has said anything about suffering, being beaten up, or anything of that kind. He has testified that he was in an internment camp for 17 months, and the worst that I can find

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is that he testified that his wife had been mistreated. She was told that he was in Austria, having committed some crime, and was going to be sent up for 8 years, and that as a result she had a miscarriage.

On the other hand, Dasch goes further. He gets in with these high officials and works his way up to an important job. Then he goes over to Kappe and starts to help Kappe with this school. He works with him before the school gets started, and then works with him during the school. The defense tries to tell you that Dasch was not interested; he did not heil Hitler; he did not keep up with his studies, and all that sort of thing. As for Burger, they took him even though they knew he was not a saboteur.

Those men were under Kappe, who I presume was not the dumbbell that these defendants would have you believe him to be, because, if you take their story, I cannot conceive it possible that a man with Kappe's ability and the position he had would seek to take an outfit of this kind and send it abroad--an expedition of this kind, constituting simply eight morons, as you might say, who had no intention of going through with this at all.

Kappe was smart. He knew his men. He knew where they had been. He knew, apparently, from the testimony, that Burger had been up there on some sort of secret mission. That was when the Gestapo took him. He was up in Poland, making reports. He was connected with the higher authorities in Germany. I do not know whether or not he was a secret agent. I do know that when he came back, he got a good job. He was picked, in spite of that job, by Kappe, and so was Dasch. I would not be

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surprised if he were still over here in the guise, possibly, of a German agent. He might have been an undercover man there.

Then they come to the point that in New York he changes his mind. He says he could not come here--could not get himself, rather, to come and turn this in to the F. B. I. until such time as he had played pinochle and rested his nerves.

You remember that the first day, when they arrived and met this coast guardsman, they then went to the railroad station. Afterward, while waiting, the thought came to his mind then and there, for the first time, Should he call up the F. B. I.? The reason why he did not do that, he said, was that he was afraid these other men might see him.

When he was caught by the coast guard, it seems to me, was the first time that thought entered his mind that they were going to be caught, and that the best thing to do was to run to cover. He goes, then, into New York and has his talk with Burger. Then they get together, and that is the reason, probably, why their stories coincide, each corroborating the other.

Then he goes on and plays cards all of Monday night, all day Tuesday, Tuesday night, and comes back Wednesday morning, if I remember rightly, stating that that had steadied his nerves.

If he had been honest in his intentions at that time, as was the testimony of one of the prosecution's witnesses, Mr. Downey, and turned in on that Sunday night when he called up the F. B. I. in New York, it might have been possible for the Government to have caught this submarine coming into Florida. In spite of the fact that it was on a route some 500 or 700

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miles longer, it could have been more closely watched, with a much better possibility of apprehending it.

Burger said that when he went to Germany in 1940, I think, he did not take out his citizenship, because he thought that Germany was in the war, and he thought he would be a rat if he did not go back and help his country. Yet after he stayed there, he came back to the United States under false pretenses: as he says, in order to get away from Germany, which is still, it seems to me, being a rat.

The last charge and specification is that of conspiracy. I want to invite the Commission's attention to that fact. If the Commission by chance should believe the testimony of any one of these defendants, that defendant is still guilty of conspiracy, because all the defendants conspired to come here and commit all the acts charged under Charges I, II, and III. The fact that one man goes into a conspiracy without honestly intending, we will assume, to go through with it or with the sabotage, makes him still guilty of the conspiracy, because he is helping the whole program to be accomplished, getting these other men over, getting them through the lines, getting them their dynamite and other apparatus there, and, if they had not been apprehended, letting them go ahead with the sabotage. The fact that he did not intend to go through with it himself does not excuse him from the conspiracy.

There is one other thing I want to say with regard to this legal or illegal getting out of Germany. I fail to understand the status of either Burger or Dasch when they wanted to get out legally--Burger, particularly. Burger had been there since 1933. He said he did not want to go until he



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got an opportunity to go out legally, because he wanted to protect his family. Likewise, Dasch wanted to protect his family. But how much are they going to protect their families by having come over like this and turned in to the United States than if they had gone out illegally, as they call it? Their families are going to be in the same position, if not worse, because of the fact that they discarded the plan when they got over here, as they would be in if these men had got out of Germany by the way thousands have been doing it in the last few years.

It seems to me that the prosecution has proved all the elements of all the specifications and that all these defendants should suffer punishment by death. The only question in that connection is that which has been brought up by counsel, namely, that one or two of these defendants have in some way assisted the prosecution. That is true. Reference has been made to the testimony of possibly pleading guilty in court and getting a sentence and receiving a Presidential pardon later, some saying in six months, some saying in three months; it is immaterial.

That is a question with which I do not think this Commission should concern itself. The question before this Commission is, Are these men guilty, or are they not, of the crimes or offenses charged? What they have done to assist the Government may amount to little, or it may amount to a great deal; it all depends on the circumstances, which are not before this Commission, and of which this Commission can know nothing at all, as to just what they did or what they might do. That is a matter of clemency for the appointing authority.



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I respectfully urge the Commission to take into consideration the old maxim of courts: that clemency is a matter for the appointing authority and is not a matter for the court. It is for that reason that we do not think that those circumstances that have been brought up should be considered by the Commission in finding its sentence. For that reason, we ask for a finding of guilty under each specification and a sentence of death.

The President. I think we shall now recess.

The Attorney General. I shall take only about ten minutes, at the outside. If the Commission would be willing to hear me now, it would be a very great convenience for me. I guarantee not to go over ten minutes.

The President. I want to impress upon counsel that we are not concerned with the time. This Commission is charged with a heavy responsibility, and I do not like the insinuation that you are taking up our time.

The Attorney General. I am sorry; I did not mean that. I meant that in view of the fact that this was the ordinary time for adjournment, I was asking for personal consideration for myself, if you would hear me now.

The President. All right. We shall be glad to hear you. Take whatever length of time you need.

CLOSING ARGUMENT IN BEHALF OF THE PROSECUTION  
By  
THE ATTORNEY GENERAL

The Attorney General. I had at first thought it would be unnecessary for me to say anything. Even now I hesitate somewhat, in view of the admirable analysis of the case by the Judge Advocate General, and in view, also, of the fact that the facts speak for themselves, and speak loudly. But with

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reference to the espionage charge, it seemed to me that I could briefly point out a very few parts of the testimony that to me appear to clinch this entirely.

Starting with the definition that the Judge Advocate General has already called to your attention, that it is not essential that the accused obtain the information sought or that he communicate it, but that the offense is complete with the lurking or dissimulation or intent to accomplish these objectives, I wish to point out that these men came here with the intent of communicating with Germany and among themselves. They are enemies, and if they communicate among themselves or intend to communicate among themselves, that is sufficient; and obviously communication with the Reich is sufficient.

Cincy  
fls..  
12:35

1b

Cinci  
fis  
Attig  
12:35  
p.m.

I will read very briefly from some of the evidence.

First, Kerling, page 2323:

"Q There has been introduced in evidence a handkerchief, which I think had an address in Portugal.

"A Portugal, yes.

"Q Was that address given you?

"A That was given us by Kappe.

"Q For what purpose were you to use that address?

"A Kappe had an address where he always could reach me when there was a means to get over here, to get mail through, which is not at present, and if I should ever lose out on that address, that couldn't do any good any more, to reach me I could give him a message through Portugal.

"Q In other words, you left him an address, where you could be reached?

"A Yes.

"Q And if you changed that, then you could communicate with him?

"A Yes."

Page 2622, the defendant Burger--this is with respect to the Chicago Tribune advertisement--:

"A No. I was to put up an ad, advertising in the paper. I can't express myself in English.

"Q You were to put an advertisement in the newspaper; is that right?

"A Yes, sir.

"Q In the Chicago Tribune?

"A Yes.

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"Q When were you to put it in?

"A May I explain that? Reinhold Barth wanted to come over, and Kappe said in a more or less general way that he wanted to come over later, but he did not state when.

"Q Did Reinhold Barth state when he, Barth, wanted to come?

"A Yes. He told me personally that he wanted to come over in September.

"Q September, 1942, of course?

"A Yes.

"Q Who was Barth going to bring with him? Was he going to bring Swenson?

"A No.

"Q Who was he going to bring?

"A He didn't tell me that he wanted to bring anyone, but he mentioned that he wanted to bring another group with him.

"Q Was he coming from Lorient, too?

"A He didn't say that.

"Q What was the arrangement as to the advertisement?

"A Reinhold Barth told me that I should, on the first and the 15th.

"Q The first or 15th of what?

"A Of the month of August, as soon as I had established a front, my identity in Chicago, I should put an ad in the Chicago Tribune as a commercial artist.

"Q What was the ad supposed to show?

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"A That would mean that we established this front, that we built up an identity.

"Q Was that to be a communication to Barth and Kappe that you had established your front in America? Is that right?

"A Yes."

In other words, when they had established a front, the ad would show that, and then Barth was to come over in the next submarine.

Haupt, at page 1635:

"We were also told that we were to attempt to develop contacts and assistants in the United States for the purpose of generally creating terror and panic, by causing explosions in places such as locked boxes in railway stations. \* \* \*

"Kerling was furnished with a small bottle containing several matches to be used for secret writing. Lieutenant Kappe was in charge of these preparations."

Thiel, at page 1802:

"He told us that this course was for the purpose of writing between us members after arriving in the United States. I wish to state that I have never been instructed to communicate in any way with the other side, that is, Germany."

The leaders were given addresses with which they could communicate if they deemed it advisable to do so.

"In fact we were never to communicate. In fact we



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were never given any means to communicate with Germany or instructions to do so. However, I do recall having heard at some time that there might be an address to write to in Portugal."

That is Thiel, who did not know about the handkerchief except what he had heard.

Dasch, at page 1553:

"I was also given four or five matches that were capable of producing secret writing. No one else in my group got any of these matches. I was told that after we became settled and located in the United States I was to communicate by use of these matches with Lieutenant Kappe in Berlin. The communication was to be effected by using a mail drop address in Lisbon, Portugal, which was furnished to me in secret writing on a white handkerchief. This address, which I do not know from my own memory, was to be produced by putting the handkerchief in ammonia and holding it up to the light. There was also an address of a relative of George Dasch's on this handkerchief in secret writing, which I could use to get in touch with Dasch in case I needed assistance from him or any member of his group."

Colonel Ristine. Whose testimony was that, Mr. Attorney General?

The Attorney General. That testimony was Kerling's. I thought I mentioned it. That was Kerling at page 1553.

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Dasch, page 1334:

"Dasch: That is the address which should be used as an undercover in case we should need it. Lopez, Lisbon. Walter Frohling, 864 Whipple Avenue or Whipple Street, Chicago. This is to be used in case we decide at our headquarters to find a farm, a hideout where we put the boxes.

"Traynor: Do you gather that this was where he lived?

"A I think this Walter Frohling is either a relation of his or a friend or he could have been or had something to do with the Bund. This is the address over which I shall also reach Kerling. I thought I put that down better. 21-55. Franz Daniel Posterious, Helmuth Leiner, 21-58 39th Street in Astoria.

"Q Is that to contact Kerling - that address?

"A That is the address over which I could always contact Kerling in case I get lost."

I think it unnecessary to read more of this. There is quite a good deal more evidence on it, but my point is that they came with the means and the instructions to communicate and intended to do so.

Lest it should be thought that I had not clearly expressed myself, I of course concur with the Judge Advocate General in asking for the death penalty. If you believe that these men were behind the lines for the purpose of sabotage and, in addition, for the purpose of spying, I think your obligation

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is to find that. I think that that is mandatory.

It is an extraordinary defense when you think of it. These men, on their own confessions, trained in Germany, come behind our lines for the purpose of sabotage, and their defense is that they never intended to do so--a defense which in every crime, whenever a man is caught red-handed could be made. Of course, when they saw the Coast Guard and knew that they might be spotted, the situation was very different.

I do not think that the situation of Dasch and Burger, except as the Judge Advocate General pointed out--that they helped the prosecution eventually to get the others--is very different from the others.

Dasch organized the camp and looked at the records and chose the men. If Burger had spent seventeen months in a concentration camp, that more suspicious would the Gestapo have been of him with regard to sending him on this highly secret and confidential mission. Yet he passed all the tests of the Gestapo. I ask you, is it reasonable to believe that, after he has come in through these lines and after having passed those tests, he never had any intention to do any evil?

You must remember that these defendants were not men who were caught in the war and were seeking to get back here. They, with their past associations, their associations with the Bund, their German citizenship, their background and action in the German Army, all went, except one, before the war between us and Germany broke out. They went over to join Germany.

Perhaps they are soldiers. Perhaps they are young. Perhaps they are neurotic. But, nevertheless, they came over

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here and went behind our lines as spies and saboteurs. To say that you cannot find that because they now tell you, without any corroboration, that they never intended to do any of this--it seems to me that if every essential fact is considered all the talk about the details is highly unnecessary.

Colonel Royall. May it please the Commission: I desire to rise for only two purposes. The first of them relates to the first charge, as to which we have never been advised before the Judge Advocate General spoke as to what part of the Rules of Land Warfare he was proceeding under. That having been our first information, we would like to submit a comment on that.

The other matter is that, in connection with certain testimony relating to Burger particularly, the Judge Advocate General did not recall any reference in the record, and we have those references, which we would like to give to the Commission. I think that is all that I want to say. It is up to the Commission.

I think I could insert the pages of the reference in the memorandum we already have. In other words, you have the references to the mistreatment of Burger himself, which the Judge Advocate General did not recollect. That is in the record at two places. The other one was his reason--the effort to protect his family by getting the promise of secrecy from the F.B.I. That is covered twice in the record. There is also the testimony of Haupt as to being caught in the war over there.

The President. If I understand, you wish to appear and speak once more in rebuttal?



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Colonel Royall. I merely want to insert those pages in the memorandum which we already have. The only thing I wanted to do in rebuttal, sir, is to refer to Rule 352 of the Rules of Land Warfare, which the Judge Advocate General said is the basis upon which the first charge is brought. The first charge does not refer to this particular rule of the Rules of Land Warfare, and we did not know exactly what section they were proceeding on with any definiteness. That has not been covered, because we did not know it before. I wanted to address a few remarks on that question alone.

The President. Are there any remarks from the other side?

The Attorney General. It seems to me, if it is appropriate to make these references, that further argument is inappropriate, but I defer to the Commission. It seems to me perfectly proper to refer you to these matters, but a continued argument after we have closed I do not think is proper.

Colonel Royall. I do not think it will take more than three minutes to say what I want to say.

The President. If there is no objection on the part of any member of the Commission, we will hear counsel for the defense.

Colonel Royall. The only thing I wanted to mention with reference to that was 352. They say now that the first charge is the charge of being armed prowlers, which is under 352 and covered by Article 84.

The word "armed" must have some significance. The statute cannot be read as if it said "prowlers who steal within the lines or destroy bridges are guilty," because it adds the word



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"armed."

It cannot refer to taking explosives, because it says "armed prowlers who steal in for the purpose of destroying bridges." By adding the word "armed" they must mean that the individual is armed. Otherwise they put a word in there that does not mean anything, and that cannot be presumed.

There is no evidence that these individuals were armed personally in any way, and the explosives were not capable of immediate use. They required preparation, and therefore they could not be armament in any sense.

We do not think that they have proven the charge under 352. We did not know what the charge was until this time, definitely, and that is the reason why we call it to your attention. That is all we care to say.

The Judge Advocate General. I just want to say this. I do not see how counsel can plead surprise when counsel was arguing that very thing to the Supreme Court.

Colonel Royall. Yes, but you covered everything. You did not confine the charge to that particular thing.

The Judge Advocate General. I just want to invite the Commission's attention to the fact that Section 352 is not limited to armed prowlers. It says, "armed prowlers, by whatever names they may be called, or persons of the enemy territory who steal within the lines of the hostile army."

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There is not any question of armed prowlers requiring to be proved here. If there were such a question, if you refer back to the testimony, when the submarine landed at Long Island the men in the rubber boat had Very pistols and side arms, and the submarine down in Florida had a deck gun. That brings it

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under "armed prowlers," if counsel insists on that, but that is not necessary. It says, "persons of the enemy territory."

Colonel Munson. Has the defense anything further to offer?

Colonel Royall. Nothing.

Colonel Munson. I am instructed by the Judge Advocate General that they have nothing further to offer on behalf of the prosecution, so both sides, therefore, now submit the case.

A Member. We wanted to ask you one question about part of the record. We want to refer back to the record. Do you remember where you objected to all of the Dasch statement being put in?

The Attorney General. Yes, General.

A Member. A question then was raised with reference to it. I believe you all consented to the fact that he could go ahead and read it into the record. I do not believe the record shows that.

The Attorney General. Could it now show that?

A Member. I believe at that time we were standing here and I do not believe that they were taking it down. It may be that the reporter has it down there, but I wanted to be sure about that before you went away. Do you remember that?

The Attorney General. Oh, yes.

The President. Is that statement as you remember it?

The Attorney General. Yes.

The President. Is that consistent with your recollection?

Colonel Royall. I recall that the Attorney General or someone for the prosecution made that statement.

The President. We could not find it this morning and we

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did not want to let the Attorney General get away before we were sure that that appeared in the record as being agreed to by all concerned.

A Member. I understood that Colonel Ristine had said somewhere that he was going to read that into the record, or, at any rate, I called attention to that at that time, and we agreed that he could read it into the record in that way, and I think the record ought to show that, because you had an objection to its being read in otherwise.

Colonel Royall. That is exactly as we recall it.

The Judge Advocate General. Now that the Commission is opened, I notice that I failed to submit the notes that I made. I would like to have those go in at this time.

The President. That can be corrected in that respect, if that is your remembrance of it.

(There was a discussion off the record, after which the following occurred:)

The President. I am going to take the responsibility at this moment of declaring a recess until 2 o'clock. I have in mind at that time, if there is nothing to be taken up with either side, declaring an adjournment, while we are considering the case fully, so that the prisoners can be returned, and I am sure there will be no objection to your departure then. I would like you to return at 2 o'clock. As far as the Attorney General is concerned, we will accept his departure with regret.

Thank you very much for your part in the whole case, Mr. Attorney General.

I do not think there is anything now, since we have been

assured of the agreement on the record, that we need do in your presence.

The Attorney General. I appreciate that very much.

(There was a discussion off the record, after which the following occurred:)

The President. We will recess until 2 o'clock.

(Thereupon, at 12:57 o'clock p.m., a recess was taken until 2 o'clock p.m. of the same day.)

8/1/42  
Wilfong

## AFTER RECESS

The Commission reconvened at 2:24 o'clock p. m.,  
at the expiration of the recess.

The President. The Commission is open.

Colonel Munson. The full personnel of the Commission,  
the eight defendants, and the reporter, are present. The  
prosecution staff is present except the Attorney General and  
Mr. Rowe.

The defense staff is fully present.

The President. The prosecution and the defense having  
nothing further to offer, the Commission is closed.

(Whereupon, at 2:25 o'clock p. m., the Commission  
was closed.)



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